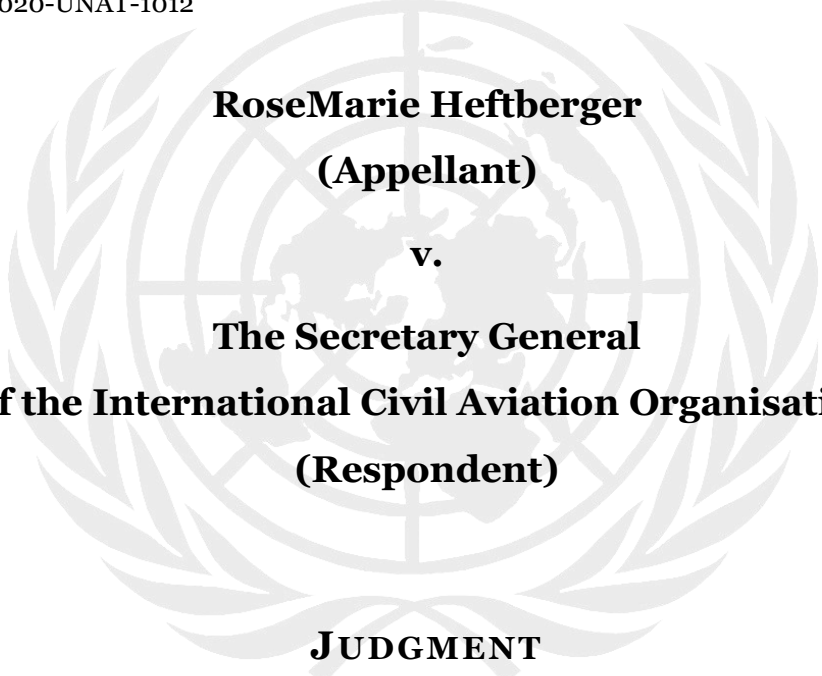




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2020-UNAT-1012



**RoseMarie Heftberger  
(Appellant)**  
v.  
**The Secretary General  
of the International Civil Aviation Organisation  
(Respondent)**

**JUDGMENT**

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Before:	Judge Graeme Colgan, Presiding Judge Dimitrios Raikos Judge Kanwaldeep Sandhu
Case No.:	2019-1337
Date:	26 June 2020
Registrar:	Weicheng Lin

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Counsel for Appellant:	Self-represented
Counsel for Respondent:	Christopher M. Petras

**JUDGE GRAEME COLGAN, PRESIDING.**

1. Dr. RoseMarie Heftberger appeals against the decision of the Secretary General of the International Civil Aviation Organization (“ICAO”) on advice from the ICAO Advisory Joint Appeals Board (“AJAB” or “Board”) declining her appeal against the ICAO Secretary General’s decision on her challenge to her non-appointment to the position of Chief, Safety and Air Navigation Oversight Audit Section of ICAO.

2. For reasons set out below, we conclude that the ICAO Secretary General was without jurisdiction to decide her appeal and hence remand the case to the AJAB to itself consider and decide Dr. Heftberger’s appeal as a neutral first instance process.

**Facts and procedure relevant to our decision**

3. Because of the fundamental jurisdictional point on which we have decided this appeal, only the following needs to be said about the relevant facts and, more importantly, the process by which this case has reached this Tribunal.

4. Dr. Heftberger was a specialist technical staff member of ICAO. She applied for a vacancy and although interviewed, she was not appointed. She applied for a review of the appointment, but this was declined. Dr. Heftberger then appealed to the AJAB pursuant to ICAO’s Staff Rules. Those Rules follow the provisions of an Agreement entered into between ICAO and the United Nations whereby appeals from a neutral first instance process can be brought to this Tribunal. That Agreement in turn purports to comply with Article 2(10) of the United Nations Appeals Tribunal Statute.

5. The AJAB considered Dr. Heftberger’s appeal to it and, in a comprehensive and reasoned opinion issued by it on 9 September 2019, recommended to the ICAO Secretary General that she deny and dismiss Dr. Heftberger’s appeal. The AJAB’s opinion includes findings of fact, sets out issues of law and provides reasons for its advice. The ICAO Secretary General considered the AJAB’s opinion, agreed with it and, on 16 September 2019, rejected Dr. Heftberger’s appeal in its entirety.

### **Submissions**

6. Because these address the merits of Dr. Heftberger’s appeal and the correctness of the ICAO Secretary General’s decision based on the AJAB’s opinion, and with no disrespect to the comprehensiveness of them or to the parties, we do not propose to set out or comment on the submissions that each party has advanced. Because of the way we deal with this case by remanding it to the AJAB for decision by it, rather than recommendatory opinion to, and decision by, the ICAO Secretary General, it would not be right for us to express opinions on matters that must be re-decided and from which fresh rights of appeal to this Tribunal may lie.

### **Considerations**

7. We deal first with our reasons for declining the Appellant's request for an oral hearing. That decision was recorded in a minute issued on 25 April 2020 in which we said we would give reasons subsequently. The Registry informed the parties on 10 June 2020 that there would not be any hearing in the present case. Dr. Heftberger’s reasons for seeking an oral hearing were that it would provide her with her first opportunity “to face an independent and impartial tribunal”. She asserts that the appeal raises a requirement to evaluate evidential credibility arising out of her claim that facts were improperly assessed by the ICAO. She wishes to have an opportunity to call witnesses to support her written statements.

8. Because of the way in which this appeal must necessarily be decided on a fundamental jurisdictional point and, for reasons set out below remanded to the ICAO AJAB, none of the circumstances relied on by the Appellant for an oral hearing will arise now. The test set out in Article 18(1) of the Rules of Procedure of the Appeals Tribunal (that such will assist in the expeditious and fair disposal of the case) is not engaged. That application was therefore refused.

9. Unfortunately (because this appeal was filed and responded to after a series of judgements issued by this Tribunal in October 2019 highlighting the point, albeit in respect of other international organisations), we have had ourselves to identify that there is a fundamental jurisdictional barrier to this appeal being considered and decided by us. It will be sufficient to refer to only one of the now several judgments issued by this Tribunal in both October 2019 and March 2020, as exemplifying this fundamental jurisdictional flaw in the

ICAO's Staff Rules, and thereby in the manner in which Dr. Heftberger's appeal was dealt with. That judgment is *Spinardi*.<sup>1</sup>

10. Because this jurisdictional point has been made in a number of judgements issued since *Spinardi*, we confine our reasoning in those cases as it is applicable to the circumstances of this case. This Tribunal's jurisdiction is derived from Article 2(10) of the United Nations Appeals Tribunal's Statute. This provides materially (with the added emphasis being ours to highlight the provisions in issue):

The Appeals Tribunal shall be competent to hear and pass judgement on an application filed against a specialized agency brought into relationship with the United Nations in accordance with the provisions of Articles 57 and 63 of the Charter of the United Nations or other international organization or entity established by a treaty and participating in the common system of conditions of service, where a special agreement has been concluded between the agency, organization or entity concerned and the Secretary-General of the United Nations to accept the terms of the jurisdiction of the Appeals Tribunal, consonant with the present statute. Such special agreement shall provide that the agency, organization or entity concerned shall be bound by the judgements of the Appeals Tribunal ... Such special agreement may only be concluded if the agency, organization or entity utilizes *a neutral first instance process that includes a written record and a written decision providing reasons, fact and law*. In such cases remands, if any, shall be to the first instance process of the agency, organization or entity.

11. The ICAO's inclusion in this appellate regime is by virtue of an Agreement entered into between the United Nations and ICAO pursuant to Article 2(10) of our Statute. This provides materially at Article 2(6) in relation to appeals to this Tribunal from ICAO and its staff:

An application shall not be receivable unless the person concerned has previously submitted the dispute to the neutral first instance process provided for in the Staff Regulations of the Organization and the latter has communicated its opinion to the Secretary General, except where the Secretary General and the applicant have agreed to submit the application directly to the Appeals Tribunal.

12. The ICAO's internal appeal process leading to its AJAB derives from that Agreement and from the relevant Staff Rules which purport to reflect that Agreement. The relevant Staff Rules include in relation to an appeal to the Board:

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<sup>1</sup>*Spinardi v. Secretary-General of the International Maritime Organization*, Judgment No. 2019-UNAT-957.

... After full consideration, the Board shall, by a majority vote, adopt and submit a report to the Secretary General. The report should include a summary of the case and the recommendations of the Board with the result of the vote on each of the recommendations. Any member of the Board may have a dissenting opinion included in the report. The report shall be considered as constituting a written record of the proceedings and a written decision providing reasons, fact and law and will include the Board's recommendation.

... In the case of an appeal against a decision to terminate or take other action on the grounds of inefficiency, the Board shall not consider the substantive question of efficiency, but only evidence that the decision has been motivated by prejudice or by some other extraneous factor.

... The Board shall make every effort to send its report to the Secretary General within three weeks after completion of the hearing.

... The decision taken by the Secretary General, after the Board has forwarded its report, shall be notified to the staff member together with a copy of the Board's report not later than 15 working days after receipt by the Secretary General of the Board's report. Except in disciplinary cases, a copy of the communication will also be transmitted to the Executive Committee of the Staff Association.

...

... In cases where the Secretary General decides not to accept a recommendation by the Board which is favorable to the appellant, the Secretary General shall provide a fully reasoned decision.

13. As in *Spinardi* and the cases which have followed it, the decision of Dr. Heftberger's complaints was not made "utiliz[ing] a neutral first instance process" as required jurisdictionally by Article 2(10) of our Statute. Although there was such a process on the way to making a decision of the complaint or dispute, the decision of it was not a part of that neutral process. The decision was made by the ICAO Secretary General whose own earlier decision(s) Dr. Heftberger had challenged. All that the neutral first instance process did was to provide an advisory opinion or recommendation to the Secretary General of ICAO who, in turn, accepted that advice and confirmed her own previous decision made as the Appellant's employer. Although it did not happen in this case, it has in others that the opinion or recommendation of the neutral body in favour of the staff member is not accepted by the Agency. That possibility exists under the ICAO regime and illustrates the fundamental flaw in the process adopted by it.

14. While the AJAB's "opinion" is detailed (running to 21 pages on A4 paper) and contains "reasons, facts and law", it cannot be said to be a decision resulting from a "neutral first instance process". The decision in this case was made by the ICAO Secretary General who cannot be said to be "neutral" in the sense that she was deciding an appeal against her own previous decision. We consider that the intention of the provisions of Article 2(10), and of the Agreement entered into thereunder, was to provide staff of ICAO with an independent and professional avenue of appeal against decisions of the ICAO Secretary General, albeit within the structure of the Organisation rather than, as in the case of the United Nations Dispute Tribunal, external to it. This was intended to provide staff of those organisations entering into such special agreements, with both a neutral first instance and, in turn, with a second, neutral and final right of appeal as the United Nations staff have to this Appeals Tribunal from the United Nations Dispute Tribunal. The way in which Article 2(10) has been misinterpreted and misapplied by ICAO and other international organisations has, however, provided only a single and final right of appeal to a neutral decision-maker. That misinterpretation and misapplication has meant that staff of such other international organisations have enjoyed dispute resolution rights inferior to those afforded to United Nations' personnel. That was not the intention of such special appellate arrangements.

15. As already noted, in these circumstances, it would be inappropriate for us to enter into a consideration of the merits of Dr. Heftberger's appeal which must be allowed (although on grounds other than those advanced by her which we do not decide or comment on) and is remanded to the ICAO AJAB for rehearing and decision in accordance with Article 2(10) of the Statute of the Appeals Tribunal.

**Judgment**

16. The appeal is allowed, the ICAO Secretary General’s and/or the AJAB’s decision is set aside, and the case is remanded to the AJAB for decision in accordance with Article 2(10) of the Appeals Tribunal Statute, that is by “a neutral first instance process that includes a written record and a written decision providing reasons, fact and law”.

Original and Authoritative Version: English

Dated this 27<sup>th</sup> day of June 2020.

*(Signed)*

Judge Colgan, Presiding  
Auckland, New Zealand

*(Signed)*

Judge Raikos  
Athens, Greece

*(Signed)*

Judge Sandhu  
Vancouver, Canada

Entered in the Register on this 9<sup>th</sup> day of July 2020 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar